Supreme Court, U.S.
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NO. 86-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM AUSTIN AND AULEMIC, INC.,
Petitioners,

v.

LEXINGTON INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

In the Petition for a Writ of Certiorari, we showed that by reaching out to decide a question of Texas state law pending before that state's highest court, the United States Court of Appeals for the Fifth Circuit violated fundamental principles of federalism. Respondent's Brief in Opposition demonstrates the validity of this point and the necessity that the petition be granted.

Respondent's brief is devoted almost entirely to an exposition of the conflicting decisions rendered by the intermediate appellate courts of the state of Texas and of the federal district courts in Texas interpreting the provisions of the Texas Insurance Code relied upon by Petitioners in seeking damages for Respondent's unfair claims handling practices. Although Respondent attempts to harmonize some of the conflicting decisions and distinguish those which reject his theories, he admits that "the rationale of each case and the precise holdings vary."[1] What Respondent fails to tell this Honorable Court, however, is that the Texas Supreme Court has granted writs of error in several cases[2] in order to resolve the conflicting opinions of the lower courts throughout

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1. Respondent's Brief in Opposition at page 4.

2. The Texas Supreme Court has granted writs of error to review the following decisions:

Chitsey v. National Lloyds Insurance Company, 698 S.W.2d 766 (Tex. App.—Austin 1985, writ of error granted), 29 Tex. Sup. Ct. J. 390 (May 28, 1986), a case cited by Respondent, Lexington and the court of appeals for the proposition that Texas law does not provide a private cause of action for treble damages under Art. 21.21 for unfair claims settlement practices.

Arnold v. National County Mutual Fire Insurance Co., (Tex. App. —Houston [1st Dist.] August 22, 1985, writ granted), 29 Tex. Sup. Ct. J. 78 (Nov. 27, 1985), a case where Plaintiff was denied a private cause of action for unfair claims settlement practices under Art. 21.21.

Aetna Casualty and Surety v. Marshall, 699 S.W.2d 896 (Tex. App.—Houston [1st Dist.] 1985, writ granted), 29 Tex. Sup. Ct. J. 532 (July 16, 1986), a case where Plaintiff was awarded treble damages against his workers' compensation insurance carrier for unfair claims settlement practices under Art. 21.21.

Writ of error appeals are pending before the Texas Supreme Court in the following case:

Texas Farm Bureau Mutual Insurance Co. v. Vail, 659 S.W.2d 692 (Tex. App.—Dallas 1985, writ requested), a case where Plaintiff was denied treble damages under Art. 21.21 for unfair claims settlement practices.

this entire field of insurance law. Particularly important is the fact that a key case relied on by the Fifth Circuit, *Chitsey v. National Lloyds Insurance Company,*[3] was briefed and orally argued to the Texas Supreme Court *prior* to the decision of the Fifth Circuit below.

For the Fifth Circuit to render a decision on a matter of Texas law which the Texas Supreme Court has agreed to hear as a part of its consideration of several important points of Texas law is not only disrespectful of the function of the role of that state's highest court in developing Texas law,[4] but may also prove to be an embarrassment to the federal judiciary if the ruling of the court of appeals turns out to be incorrect. *See Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 500 (1941). The fact that the Texas Supreme Court has granted writs of error in several of these cases in this area in order to resolve the conflicting opinions in an entire field of insurance law, including the precise question at issue in this case, should control the disposition of this appeal.

Instead of divining state law questions which are pending before the state's highest court, the court of appeals should have stayed its action pending the decision of the state supreme court, or more appropriately, certified the question of state law to the state supreme court to decide in conjunction with its consideration of the entire field of law. To make an advance guess as to the

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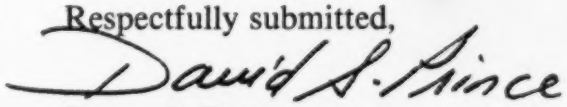
3. 698 S.W.2d 766 (Tex. App.—Austin, writ of error granted), 29 Tex. Sup. Ct. J. 390 (May 28, 1986).

4. "National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris,* 401 U.S. 37, 44 (1971).

result, or worse—to ignore all of the decisions of the state's highest court as the court of appeals did in this case—is an unconstitutional and unnecessary interference by the federal court with the development of state law and with the interpretation of the statutes of the Texas legislature. Furthermore, the Fifth Circuit's decision on a question of state law which is pending before the Texas Supreme Court is prejudicial to the litigants by giving them "a ticket for one ride only." Brown, Certification—Federalism in Action, 7 CUMBERLAND L. REV. 455, 456 (1977).

For the reasons stated herein and in the Petition for a Writ of Certiorari, Petitioner respectfully submits that the Petition should be granted.

Respectfully submitted,



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